United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

Date: September 30, 1997

Case No. **96 INA 163**

In the Matter of:

O'MALLEY'S SALOON
Employer

on behalf of

JESUS FERNANDEZ-MARTINEZ,
Alien

Appearance: Mario DeMarco, Esq., of Farmingville, New York

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of JESUS FERNANDEZ-MARTINEZ (Alien) by O'MALLEY'S SALOON (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A)(the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U. S. Department of Labor at New York, New York, denied the application, the Employer requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and avail-

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

able at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the criteria of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On May 25, 1994, the Employer, which operates a restaurant in Bridgehampton, New York, applied for labor certification on behalf of the Alien for the position of Grill Cook. Employer offered a basic wage of $320 per forty hour week with overtime of $15 per hour. Although Employer did not state an educational requirement, it required two years' experience in the job offered. The duties of the Job to be Performed were these

> Prepares and grills various meat, fish and vegetable dishes. Fries vegetables and fish in deep fryer. Organizes menu & shopping lists. Works with all kitchen related equipment.

The position was classified as Cook, under DOT Occupational Code 313.361-014. AF 06.[3]

Notice of Findings. On October 26, 1995, the Notice of Findings (NOF) issued by the Certifying Officer (CO) denied certification, subject to Employer's rebuttal. AF 26-29.

(1) The CO found that the Employer's application violated 20 CFR § 656.21(b) (5) in that it required two years of experience in the job. The CO noted from the evidence of record that the Alien did not meet the Employer's job requirement of two years' experience and the CO then inferred that the Employer hired the Alien without the requisite qualifications and thereafter trained him on the job. Accordingly, the CO required the Employer to amend the job requirements and readvertise the position or to

---

[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

[3]The Alien was employed from February 1992 to March of 1993 as a cook in a restaurant in Mexico, where his duties were similar to those stated in Item 13 of the Employer's application. AF 01.

document that it could not train a U. S. worker with less than two years of experience to perform the work.

(2) The CO observed that the Employer had rejected Mr. Nealous, a well qualified U. S. worker who applied and was referred for this position. The CO did not accept Employer's reason for rejecting this applicant, finding that the Employer had failed to engage in good faith recruitment within the meaning of the Act and regulations, citing 20 CFR §§ 656.20(c)(8), 656.21 (b)(7), and 656.24 (b)(2)(ii). The CO then stated the evidence that the Employer must file to support its representation that it did, in fact, respond to the referral by communicating with this candidate. AF 26-27.

Rebuttal. Employer submitted its rebuttal on October 26, 1995. AF 30-32. The evidence included Employer's letter to the CO and a photocopy of the certification receipt for a letter to Mr. Nealous, and counsel's cover letter referring to the recruitment report.

Final Determination. The CO denied certification in the Final Determination (FD) issued November 29, 1995. AF 33-35.

(1) The CO found that the rebuttal evidence was insufficient to establish under 20 CFR § 656.21(b)(5) that its experience requirements were the minimum necessary for the performance of the job, and that it had not hired or could not hire workers with less training or experience. Employer relied on the Alien's representation that he had worked forty-eight hours a week for thirteen months in his previous job as a restaurant cook in order to establish the requisite experience in the job. Assuming this was factual, the CO found that experience asserted did not total two years and concluded that the Employer failed to comply with 20 CFR §§ 656.20(c)(8), 656.21 (b)(7), and 656.24 (b)(2)(ii).

(2) The CO found that the Employer failed to engage in good faith recruitment within the meaning of the Act and regulations. To prove that it had responded correctly to the referral of Mr. Nealous, the CO had ordered the Employer to file a recruitment report by the Employer and not by the Employer's agent, a copy of Employer's letter to the U. S. worker, a copy of the certified mail receipt, and other evidence supporting the finding of a lawful reason for rejecting this qualified candidate. As the Employer failed to comply with this direction, the CO denied certification for this additional reason. AF 33.

Appeal. On December 14, 1995, the Employer appealed the Coo's denial of certification to the Board. AF 36.

DISCUSSION

(1) Employer contends in its brief on appeal that the Alien was qualified for this job by his previous employment as a restaurant cook and by fourteen months of work as a cook in its own restaurant. AF 36. The Alien's employment as a cook while working in the Employer's restaurant was not mentioned in his statement of his own work experience. AF 01. Instead, the Alien said he was self-employed at odd jobs for several months while living in the United States. As the Alien's representation contradicts the Employer's argument on appeal and is sworn, it is credible and the Employer's assertion in its appeal is not. Because the Employer's new statement in support of the Alien's qualification for the position at issue was incorporated in its brief on appeal and was not before the CO at the time of the Final Determination the Employer's assertion should be rejected, if for no other reason. **Capriccio's Restaurant**, 90 INA 480 (Jan. 7, 1992).[4]

Consequently, we affirm the CO's finding that the Alien did not meet the Employer's job requirements at the time he was hired for the position at issue. **Capriccio's Restaurant,** 90 INA 480 (Jan. 7, 1992). It is concluded that the Employer has violated 20 CFR § 656.21(B)(5) in that it failed to document that it is not now feasible to hire a U. S. worker without the training or experience demanded in Part 13 of its application for certification. **Ridge Precision Products,** 95 INA 149 (Nov. 22, 1996).

(2) The CO found that the Employer failed to engage in good faith recruitment within the meaning of the Act and regulations. To prove that it had responded correctly to the referral of Mr. Nealous, the CO had ordered the Employer to file a recruitment report by the Employer and not by the Employer's agent, a copy of Employer's letter to the U. S. worker, a copy of the certified mail receipt, and other evidence supporting the finding of a lawful reason for rejecting this qualified candidate. **Downey Orthopedic Medical Group**, 87 INA 674(Mar. 16, 1988)(en banc); and see **North Shore Health Plan**, 90 INA 060(Jun. 30, 1992). As the Employer's rebuttal did not include the documentation it was directed to file, the CO denied certification for this additional reason. AF 33.

It is well established that an employer's failure to produce documentation reasonably requested by the CO will result in the denial of labor certification. **Edward Gerry,** 93 INA 467(Jun. 13, 1994); and see **D Rose Linens**, 93 INA 157(Mar. 18, 1994). The documentation that this CO directed in this case, moreover, was essential to the Employer's proof of good faith recruitment. It follows that the Employer failed to sustain its burden of proof in that it did not provide the supporting evidence to demonstrate

[4]Also see **O'Malley Glass & Millwork Co.,** 88 INA 049 (Mar. 13, 1989).

that it had complied with the Act and regulations. As Employer did not establish that it engaged in good faith recruitment, we affirm the CO's denial of certification because the greater weight of substantial evidence supports the CO's finding that the Employer failed to comply with 20 CFR §§ 656.20(c)(8), 656.21(b)(7), and 656.24 (b)(2)(ii), as discussed at length in the NOF and Final Determination.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

_____

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

Sheila Smith, Legal Technician

BALCA VOTE SHEET

Case No. 96 INA 163

O'MALLEY'S SALOON, Employer
JESUS FERNANDEZ-MARTINEZ, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: September 25, 1997